Google Inc. et al v. Egger et al

Doc. 450 Att. 2

06-36083

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL-HARAMAIN ISLAMIC FOUNDATION, INC., et al.,

Plaintiffs and Appellees,

vs.

GEORGE W. BUSH, President of the United States, et al.,

Defendants and Appellants.

BRIEF OF APPELLEES

EISENBERG AND HANCOCK, LLP
JON B. EISENBERG (CSB No. 88278)
WILLIAM N. HANCOCK (CSB No. 104501)
1970 Broadway, Suite 1200
Oakland, California 94612
(510) 452-2581 • FAX: (510) 452-3277

LISA R. JASKOL (CSB No. 138769)
610 S. Ardmore Avenue
Los Angeles, California 90005
(213) 385-2977 • FAX: (213) 385-9089

STEVEN GOLDBERG (OSB No. 75134)
River Park Center, Suite 300
205 SE Spokane Street
Portland, Oregon 97202
(503) 445-4622 • FAX: (503) 238-7501

THOMAS H. NELSON (OSB No. 78315)
ZAHA S. HASSAN (OSB No. 97062)
THOMAS H. NELSON & ASSOCIATES
P.O. Box 1211
24525 E. Welches Road
Welches, Oregon 97067
(503) 662-3123 • FAX: (503) 622-1438

J. ASHLEE ALBIES (OSB No.05184)
LAW OFFICES OF J. ASHLEE ALBIES
River Park Center, Suite 300
205 SE Spokane Street
Portland, Oregon 97202
(503) 963-3751 • FAX: (503) 238-7501

Attorneys for Plaintiffs and Appellees
AL-HARAMAIN ISLAMIC FOUNDATION, INC.,
WENDELL BELEW, and ASIM GHAFOOR

Dockets.Justia.com

defining "person" subject to civil liability "must be taken to mean governmental entity"); *accord, e.g., Adams v. City of Battle Creek*, 250 F.3d 980, 985 (6th Cir. 2001). Had Congress meant to except "the United States" from the scope of the word "entity" in section 1801(m), Congress could have done so in the manner of ECPA.

Moreover, even if defendants could invoke sovereign immunity in their official capacities, they cannot do so in their personal capacities. *See Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985); *Butz v. Economou*, 438 U.S. 478, 501 (1978). Plaintiffs' complaint may be characterized as alleging both official and personal capacity liability. *See Graham*, 473 U.S. at 167, n. 14 (where complaint does not specify whether defendants are sued in official or personal capacities or both, course of proceedings typically will indicate nature of liability sought to be imposed). And to the extent defendants are being sued in their personal capacities, they could enjoy only qualified immunity, which does not apply if they "discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule." *Butz*, 438 U.S. at 507. Given that at least some of plaintiffs' surveillance occurred at a time when the TSP continued unabated without DOJ certification and despite admonitions that it was unlawful, *see supra* at 8-9, defendants cannot claim qualified immunity.[5]

D. The District Court's Ruling Precluding Discovery of Ongoing Surveillance is Not a Basis For Concluding That Plaintiffs Lack Standing.

Defendants also contend plaintiffs lack standing to obtain prospective relief because of the district court's ruling precluding discovery of ongoing surveillance other than that revealed by the Document. BOA 35. The judge reasoned, however, that "*based on the record as it stands now*, forcing the government to confirm or deny whether plaintiffs' communications . . . continue to be intercepted . . . would create a reasonable danger that national security would be harmed by the disclosure of state secrets" and "*might jeopardize the success of the [TSP]* if it is legal." ER 573

---

[5] Defendants also contend "plaintiffs have not exhausted their administrative remedies, as required by 18 U.S.C. 2712(b)(1)." BOA 37. Section 2712(b)(1) requires presentation of a claim under the Federal Tort Claims Act before commencement of an action "under this section." Plaintiffs' FISA cause of action, however, is not under section 2712; it is under FISA section 1810. Section 2712(a) authorizes a civil action for, among other things, violating FISA sections 1806(a), 1825(a), and 1845(a); but section 2712(a) does *not* include FISA section 1810, which independently prescribes a civil action and does *not* require any exhaustion of administrative remedies. And even if section 2712's exhaustion requirement applied here, compliance would be excused because, given defendants' stubborn resistance to the very notion that they must comply with FISA, a Federal Tort Claims Act demand plainly would have been futile. *See, e.g., Honig v. Doe*, 484 U.S. 305, 326-27 (1988).